



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]

DECISION

CWK/169537

PRELIMINARY RECITALS

Pursuant to a petition filed October 20, 2015, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee County Disability Services Division-DSD in regard to Medical Assistance, a telephone hearing was held on November 12, 2015, at Milwaukee, Wisconsin. Following hearing, the record was held open to allow the parties to submit post-hearing briefs. Both parties timely submitted closing briefs.

The issue for determination is whether there exists an action by the respondent that is ripe for adjudication.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]

Petitioner's Representative:

Attorney Shirin Cabraal
6737 West Washington Street, Suite 3230
Milwaukee, WI 53214

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [Redacted]
Milwaukee Cty Disability Services Division-DSD
Attention: [Redacted]
1220 W. Vliet Street, Suite 300
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.

2. The petitioner has had ongoing CLTS Waiver eligibility since 2004, and has been receiving respite care since 2008.
3. Petitioner's case came up for its 6-month review in September, 2015. At that time, petitioner requested a respite care worker pay rate exemption for a new respite care worker. On September 29, 2015, the respondent requested that, for an exemption to be approved, petitioner provide a behavior plan, provide a respite care schedule, and undergo a personal care worker evaluation.
4. Petitioner did not undergo a personal care worker evaluation.
5. The petitioner has been diagnosed with autism spectrum disorder, and has sensory issues and a history of physical altercations with his parents, and some instances of self-harming as well.

DISCUSSION

The CLTS program started on January 1, 2004, after the federal Department of Health and Human Services informed Wisconsin that federal MA funding would no longer be available for in-home autism services. The Wisconsin Department of Health and Family Services (now the Department of Health Services) released the *Medicaid Home and Community-Based Services Waivers Manual (Manual)* to assist in administering the CLTS program. The *Manual* also covers the Community Integration 1A and 1B programs, and the Brain Injury Waiver program. It can be found on the internet at <https://www.dhs.wisconsin.gov/waivermanual/index.htm> (viewed in June 2015).

The *Manual* establishes appeal rights for petitioners confronted with the following determinations:

8.03 Waiver Agency Actions Subject to Appeal or Grievance

The following are all of the possible actions and decisions a waiver agency may make that are subject to appeal via a fair hearing by the Department of Administration's Division of Hearings and Appeals. Whenever a waiver agency takes one of these actions, the agency is required to notify an applicant, in the situations that apply to applicants and a participant and his/her guardian, if any, of the action being proposed, the reasons the action is being taken and inform the participant of his/her right to file an appeal or grievance contesting the waiver agency's decision prior to the decision being implemented. With one exception, the grounds or basis for the waiver agency's action or decision do not affect whether the waiver applicant or recipient is entitled to a fair hearing before DHA to contest the action or decision. The sole exception is that a recipient is not entitled to a fair hearing if the only issue in the fair hearing would be a federal or state law that requires an automatic change that adversely affects some or all recipients, 42 CFR sec. 432.220(b). Otherwise, federal law entitles waiver applicants and recipients to fair hearings to contest the actions and decisions identified below regardless of the waiver agency's reason for the action or decision.

Actions and decisions that are subject to appeal:

1. Denial of the Assessment

If a request for an assessment is denied, the waiver agency must notify the applicant of the decision within 30 days of the application. The denial of an assessment is subject to appeal to the Division of Hearings and Appeals.

2. Denial of Eligibility

Any denial of applicant eligibility is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals.

3. Termination of Eligibility

Any proposed termination of participant eligibility is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. October, 2008 Medicaid Waivers Manual Chapter VIII Participant Rights and Appeal and Grievance Processes Page VIII-5

4. Termination of Waiver-Covered Services

Any proposed termination of any waiver-covered service for any reason is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. Services listed in service plans but not funded by the Waiver are not waiver covered services.

5. Reduction of Waiver-Covered Services

Any proposed reduction in a waiver covered service for any reason is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals

6. Choice Between Institutional and Community Services

Any failure to give people choice between institutional and community services is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. This appeal right does not apply when a court has ordered community placement and services as the least restrictive and/or most integrated service. The right to a hearing on this subject is required by CMS under 42 CFR Part 431, subpart E, and State Medicaid Manual sec. 4442.7.B, which provides that a State operating a HCBS waiver program must provide an opportunity for a fair hearing to beneficiaries who are not given the choice of home and community-based services as an alternative to hospital, nursing home, or ICF/MR services.

7. Choice of Type of Service

Any failure to give people a choice between different types of waiver allowable community services when the cost of the services are equivalent is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. This applies only when the different services are appropriate to the person's assessed needs and are capable of addressing the individual's desired outcomes. For example, if a person qualifies for and wishes to be served in a small adult family home vs. a larger CBRF and both address the person's needs and outcomes, the person must be given choice of waiver allowable items/services when the costs of both are equivalent. The right to a hearing on this subject is required by CMS under 42 CFR Part 431, subpart E, and State Medicaid Manual, sec 4442.7, which provides in part that a state operating a HCBS waiver must "provide and opportunity for a fair hearing... to beneficiaries... who are denied the service of their choice."

8. Denial of Choice of a Qualified Service Provider

Any failure to give waiver participants a choice between qualified providers when the cost of the services required to address the person's assessed needs and outcomes are equivalent is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. The right to a hearing on this subject is required by CMS under 42 CFR Part 431, subpart E, and State Medicaid Manual, sec 4442.7, which provides in part that a state operating a HCBS waiver must "provide and opportunity for a fair hearing... to beneficiaries... who are denied the service of their choice." October, 2008 Medicaid Waivers Manual Chapter VIII Participant Rights and Appeal and Grievance Processes Page VIII-6

9. Denial of Waiver Coverage of an Item or Service

Any decision by the waiver agency to deny or limit coverage of a requested service or item for any reason is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. Under federal law, the State must grant an opportunity for a fair hearing to any person who requests it because his or her claim for services is denied, 42 CFR sec. 431.220(a)(1). Moreover, Wisconsin statutes afford the right to a fair hearing to any person who believes that waiver or other Medicaid payments made in the person's behalf have not been properly determined, Wis. Stat. sec. 49.45(5)(a).

Manual, §8.03, pp. VIII-4 – VIII-6.

Wisconsin statutes provide that, “[a]ny person whose application for medical assistance is denied or is not acted upon promptly or who believes that the payments made in the person's behalf have not been properly determined or that his or her eligibility has not been properly determined may file an appeal with the department pursuant to par. (b). Review is unavailable if the decision or failure to act arose more than 45 days before submission of the petition for a hearing.” Wis. Stat. §45.49(5).

Seeking an exemption to allow petitioner to pay a respite care worker a rate exceeding Milwaukee County's base respite worker pay rate, the respondent informed petitioner that he would need a personal care worker evaluation completed before a determination on the pay rate exemption could be made. The petitioner has not undergone a personal care worker assessment.

The petitioner argues that he should not have to participate in a personal care worker services assessment as he concedes, and his physicians apparently concur, that he is capable of performing activities of daily living appropriate for his age, though he does require some cueing to complete the tasks. Therefore, since petitioner is not requesting (and does not need) personal care worker services, he reasons that there is no basis for requiring that he undergo a personal care worker assessment.

The respondent counters that there is a question as to whether petitioner's respite care workers are providing some personal care worker services, as opposed to respite care worker services, and for that reason, a personal care worker services assessment is warranted. Specifically, the respondent relies upon direction in the *Manual* that families use Medicaid State Plan services prior to using Children's Long Term Support Waiver funds. “With the exception of care management/support and service coordination, the participant service plan must utilize services covered by the Medicaid State plan (Medicaid card services) to the fullest possible extent before using waiver funds for any service that is waiver allowable.” *Manual*, §4.06 (B).

Notwithstanding the parties' respective foregoing arguments, nothing in the record establishes the necessary occurrence of an appealable decision here. A request was made for a personal care worker assessment to provide the respondent with sufficient information to make an informed decision regarding the petitioner's request to pay a respite worker at a rate exceeding the base pay rate in Milwaukee County. I do not find this request to be unreasonable, especially in light of testimony by petitioner's mother regarding some of the duties performed by her son's respite care workers that could arguably fall under personal care worker guidelines. I understand that petitioner has been receiving services under the CLTS waiver program since approximately 2004; however, just because the respondent has not requested a personal care worker services assessment previously does not establish that the current request is unreasonable.

I have reviewed the statutes and policy language cited above, and do not find that I have jurisdiction to determine the validity of such a verification request. Based upon the record before me, I conclude that the issue presented by the petitioner is not yet ripe for adjudication by this administrative law judge.

CONCLUSIONS OF LAW

The issue presented by the petitioner as to whether respondent may require that the petitioner undergo an personal care worker needs assessment, is not yet ripe for adjudication by this administrative law judge.

THEREFORE, it is

ORDERED

That the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 22nd day of January, 2016

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 22, 2016.

Milwaukee Cty Disability Services Division-DSD
Bureau of Long-Term Support
Attorney Shirin Cabraal